TABLE OF CONTENTS

FROM OVERRULING FORD'S OBJECTIONS TO DISCOVERY BECAUSE (A) FORD HAS FAILED TO PROPERLY

TABLE OF AUTHORITIES

Cases

Other Authorities

POINTS RELIED ON

I. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM OVERRULING FORD'S OBJECTIONS BECAUSE FORD'S FAILURE TO REQUEST A RECORD OF THE HEARING AT ISSUE LEAVES NOTHING TO REVIEW IN THAT FORD HAS FAILED TO MEET ITS BURDEN TO PROVIDE THIS COURT WITH A RECORD OF THE ALLEGED ERROR

State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 71 (Mo. App. 1997)

State ex rel. Ford Motor Co. v. Westbrooke, 12 S.W.3d 386, 391 (Mo. App. 2000)

Volvo Financing North America, Inc. v. Raja, 754 S.W.2d 955, 957 (Mo. App. 1988)

II. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM OVERRULING FORD'S PRIVILEGE CLAIMS BECAUSE FORD FAILED TO MEET ITS REQUIRED BURDEN OF PROOF IN THAT FORD FAILED TO PRODUCE ANY EVIDENCE SUPPORTING ANY ELEMENT

OF

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Diamond State Ins. Co. v. Rebble Oil Co., 157 F.R.D. 691, 700 (D. Nev. 1994)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 70 (Mo. App. 1997)

State ex rel. Faith Hospital v. Enright, 706 S.W.2d 852, 856 (Mo. banc 1986)

III. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ORDERING PRODUCTION OF THE DOCUMENTS AT ISSUE BECAUSE THEY DO NOT QUALIFY FOR WORK PRODUCT OR ATTORNEY CLIENT PROTECTION IN THAT THE DOCUMENTS CONSIST OF REPORTS PREPARED BY ENGINEERS FOR SAFETY AND NOT LITIGATION OR LEGAL ADVICE PURPOSES AND THE ONE SET OF TESTS HAVE BEEN SHARED WITH THIRD PARTIES

St. Louis Little Rock Hospital, Inc. v. Gaertner, 682 S.W.2d 146 (Mo. App. 1984)

Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980)

State ex rel. American Economy Ins. Co. v. Crawford, 75 S.W.2d 244, 245-247 (Mo. banc 2002)

IV. RELATOR'S SECOND POINT (POINT B) ON APPEAL SHOULD BE DENIED AS RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM OVERRULING FORD'S OBJECTIONS TO DISCOVERY BECAUSE (A)

FORD HAS FAILED TO PROPERLY PRESERVE THIS ISSUE FOR REVIEW AND (B)RELATOR RECEIVED MORE THAN ADEQUATE PROCESS IN THAT FORD FILED THREE BRIEFS AND ATTENDED TWO HEARINGS BEFORE THE COURT OVERRULED FORD'S OBJECTIONS

V. RELATOR'S FIRST POINT (POINT A) ON APPEAL SHOULD BE DENIED AS RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ORDERING PRODUCTION OF THE DOCUMENTS AT ISSUE BECAUSE THEY ARE NOT ENTITLED TO WORK PRODUCT PROTECTION IN THAT THE DOCUMENTS ARE UNRELATED TO THE LITIGATION AT ISSUE AND WERE NOT PREPARED FOR PREPARATION OF THIS CASE

Brantley v. Sears, Roebuck & Co., 959 S.W.2d 927, 929 (Mo. App. 1998)

Halford v. Yandell, 558 S.W.2d 400, 407-409 (Mo. App. 1977)

State ex rel. J.E. Dunn Const. Co., Inc. v. Sprinkle, 650 S.W.2d 707, 711

(Mo. App. 1983)

Tobacco and Allied Stocks v. Transamerica Corp., 16 F.R.D. 534, 537

(D. Del. 1954)

VI. RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM OVERRULING FORD'S OBJECTIONS BECAUSE THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO CONTROL ITS DOCKET BY REFUSING TO ALLOW TARDY PRIVILEGE CLAIMS IN THAT FORD VIOLATED THE COURT'S PRIOR SCHEDULING ORDER, FILING A DEFICIENT PRIVILEGE LOG OVER A MONTH TOO LATE UNDER THE COURT'S ORDER

8 Wright & Miller, Fed. Prac. & Proc. Civ.2d §2016.1 (2004)

Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-542 (10th Cir. 1985)

Restorative Services, Inc. v. Professional Care Center, Inc., 793 S.W.2d141,

144 (Mo. App. 1990)

RESPONDENT'S STATEMENT OF FACTS

A. Background on the Bronco II

The following facts have been judicially determined by the Indiana Court of Appeals decision in *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. App. 1999), found at Tab B(1) Respondent's Appendix A49-72.

In the late 1970's, Ford Motor Company began designing a small sport utility to be known as the Bronco II. Id. at A55. Early in its development stability problems began to emerge in regard to "jacking" of the suspension. Id. at A56-57. Jacking causes the Bronco

II to move the tires inward reducing the track width, while at the same time, moving the front of the vehicle higher. Id. at 57. These actions lead to a decrease in the stability of the vehicle instantaneously. Id. Ford's engineers recommended a different suspension as a safer choice, but were overruled as a "result of pressures" from their superiors. Id.

As Ford began to test the Bronco II, its engineers reported the track width needed to be widened by at least four inches, as "the vehicle would tip over at speeds as low as 30 m.p.h." Id. Ford did not implement this recommendation. Id. Ford's engineers again requested changes be made to the track width of the vehicle after a test driver in May 1982 rolled a Bronco II onto its top at Ford's test track. Id. To make the additional changes recommended by its engineers would have been costly and would have delayed production of the Bronco II. Id. Ford instead halted live testing "because it was too dangerous for the engineers and test drivers." Id. Prior to the sale of the first Bronco II, Ford for the first time in its history collected all documents relating to the Bronco II's handling and stability, and maintained them in the Office of General Counsel. Id. at A57. One hundred thirteen such documents were specifically related to program reports, tests plans and analysis. Id. at A57-58. Of these one hundred and thirteen documents, fifty three disappeared after being collected by Ford's Office of General Counsel. Id. at A58. One of these documents prepared two months before the first Bronco II was shipped contained a listing of "seven major risks due to incomplete testing of the Bronco II." Id.

On November 24, 1982 Ford placed the Bronco II on the market without increasing its track width as suggested by its engineers. Id. at A58. Ford's engineers continued to

raise concerns about its stability, recommending that the Bronco II be redesigned to decrease the rollover risk from its small track width and high center of gravity. Id. Ford's engineers were again "essentially ignored." Id.

B. *Discovery requests at issue.*

On October 11, 1999 Gary Anderson was killed in a single vehicle Ford Bronco II rollover. Please see Plaintiffs Petition, Tab A Relator's Appendix A2, ¶¶ 8-11. Gary's wife, minor children, and parents brought a wrongful death action for the design defects in the Bronco II, serving Ford Motor Company ("Ford") with interrogatories and Requests for Production on July 12th 2002. Relator's Appendix Tab B, A13. Ford objected several months later on October 8, 2002. It refused to produce numerous documents under a blanket claim of privilege. Relator's Appendix Tab C, A25. At issue in the writ brought by Ford are the objections to Interrogatory 38 and Requests for Production 34 and 173. Relator's Appendix Tab B, A15-19. These requests sought (a) testing conducted on the Bronco II and (b) engineering reports by Ford's "Design Analysis" engineers showing how the Bronco II was performing in the hands of Ford's intended customers. Id.

After numerous attempts stretching over a year to resolve the disputes for these discovery requests were unsuccessful, plaintiffs on October 16, 2003 filed their first motion to compel discovery. Relator's Appendix Tab C, A25-26. Plaintiffs sought production of the material Ford was withholding on several alternate grounds. Id. Two clearly articulated grounds were (1) that Ford had failed to meet its burden because it simply made blanket objections and refused to produce any evidentiary support for the

necessary elements of the claimed privileges, and (2) that Ford had waived any privilege by its failure to file a privilege log identifying and disclosing what discovery was being withheld. Id. Plaintiffs also sought production on the grounds that Ford's objections showed even if these items had been work product, they no longer retained any protection as they were for unrelated terminated litigation. Relator's Appendix at A23-25.

At the first hearing on Ford's claims of privilege, Ford produced no affidavits or testimony in support of any of its claims of privilege. Relator's Appendix, Tab D, E, and F, A27-38. Rather than Order production for this failure of proof, the Honorable Henry W. Westbrooke Ordered Ford to produce a full and complete privilege log with all of the "necessary and sufficient information required by law". Relator's Appendix Tab F, A37. Ford sought and was granted two extensions to files its logs. Plaintiff's Motion to Compel and For Sanctions Tab A(2-3), Respondent's Appendix A11-12. When the time came for Ford to files its logs, despite having had almost 16 months since it first objected, and almost 2 months since Ordered to do so by the Court, Ford did not produce the full and required logs, nor did it seek another extension from the Court. Respondent's Appendix A1-3.

Instead, plaintiffs were forced to file another motion to compel (Plaintiffs' Motion to Compel and For Sanctions) for Ford's failure to comply with the Court's prior Order. Respondent's Appendix A1-9. In this second motion to compel, plaintiffs again challenged Ford's claims of privilege on numerous ground including waiver for failing to provide the Ordered privilege log, as well as Ford's failure to meet its burden to prove "each and every

element of either the attorney client or work product privileges." Respondent's Appendix A5-7. After plaintiffs filed their second motion, Ford on January 22, 2004 filed a second privilege log identifying additional material being withheld. Please see Plaintiffs Supplemental Motion to Compel, Tab B(5), Respondent's Appendix A80.

Plaintiffs filed their third motion to compel (Plaintiffs' Supplemental Motion and Suggestions to Compel Material Designated on Ford's Privilege Log) on February 17, 2004. Tab B Respondent's Appendix A48. This motion challenged **all** of Ford's assertions of privilege and protection. Respondent's Appendix A21-48. Specifically, plaintiffs challenged Ford's claims of attorney client and work product privilege for the testing material on the grounds that (1) Mr. Carr the author of these tests was designated as a testifying expert after the testing sought to be hidden (including in this case); (2) the failure of Ford to provide the information Ordered by the Trial Court, and (3) that Mr. Carr was not a consulting expert in the Hollander case as represented by Ford, but instead was a testifying expert who produced a written report. Respondent's Appendix A24-26; Tab G A148-151 (Produced to the Court as Exhibit I to the March 15, 2004 Hearing). Ford has since admitted that this material withheld from its testing logs was not protected. Tab L Relator's Appendix A120.

Plaintiffs also challenged Ford's claims of privilege over the post sale monitoring of the Bronco II in the consumers hands. Respondent's Appendix Tab B A27-34. Plaintiffs refuted the claims of attorney client and work product privilege for this Design Analysis material on the basis the documents were prepared by Ford engineers who are not within

the Office of General Counsel but instead the Global Engineering Group. Respondent's Appendix A27. These business documents were thus prepared for a business purpose, to pass along findings to engineers at Ford to build better cars. Id.

Plaintiffs for the second time raised Ford's blanket assertion of privilege, noting Ford's failure to provide any information to show important elements of privilege such as whether the accident involved likely litigation, the position and relationship of the person preparing the report, whether the case was resolved, whether the communication was for the purpose of seeking legal as opposed to business advice, and whether the information was shared outside of litigation. Respondent's Appendix A27-34. Plaintiffs also again raised Ford's waiver of all privilege claims for failing to meet its burden to prove each and every element necessary for each claim of privilege. Respondent's Appendix A28-29. For the second time plaintiffs also challenged the claims of work product as the items being withheld were for "prior unrelated litigation." Respondent's Appendix A33-34.

Finally, plaintiffs submitted numerous exhibits to the Trial Court. Respondent's Appendix, Tab B, A49-140 (Exhibits1-18; 29-31). One such exhibit was a prior ruling by the Honorable John D. Wiggins finding that the exact same type of reports (Design Analysis) were not privileged. Id. at Tab B(11), Appendix A109. Other exhibits showed the denial of Ford's Writ of Prohibition seeking to overturn Judge Wiggins by both the Missouri Court of Appeals Southern District and this Court. Respondent's Appendix Tab B(12-14), A110-112.

The only response by Ford to this motion was on February 23, 2004 when Ford filed

its third and fourth logs. Relator's Appendix, Tab H A54-91. These logs were more than a 2 ½ months late under the Trial Court's initial Order, and more than a month late despite being given two extensions of time. Relator's Appendix Tab F, A37. Ford's claim that these were "revised" logs is inaccurate. These logs were not "revised" logs in that missing information was not added to the prior claims of privilege, but instead Ford for the first time identified 500 additional items it had been withholding. Relator's Appendix Tab H A54-91.

The hearing for outstanding motions was set for March 3, 2004, 15 days after the filing of plaintiffs third motion. Tab C Respondent's Appendix A141. On February 27, 2004, Ford sought and was granted an extension of time until March 15, 2004 to respond to the pending motions and to prepare for the upcoming hearing. Id.; (Ford's request for extension to Respondent, noting the "seriousness" of the hearing, and the importance of Mr. Williams attending). The Docket notice provided to Ford on March 1, 2004 set all motions for hearing on March 15, 2004. Tab D Respondent's Appendix A142. Despite having sought and been granted a continuance of the hearing, Ford admits it provided no written response to plaintiffs' supplemental motion to compel discovery. Allegation 12, Relator's Brief, page 10. Ford concedes it offered nothing to contest any of the challenges to the claimed privileges made in plaintiffs' third motion to compel. Id. Ford likewise confesses it produced no affidavits and no testimony in support of any of its claims of privilege. Relator's Brief, page 22 (Admitting that no evidence regarding the role of Relator's Design Analysis engineers was presented to Respondent at the March 15, 2004

hearing). Instead, Ford offered only the arguments of its lawyers as to why the documents were privileged. Relator's Appendix, Tab K, A0118.

After hearing arguments on the various motions for almost two hours, and after reviewing various exhibits and case law, the Respondent rejected Ford's claims of privilege as unsupported and Ordered the material produced. Id. at A118-119.

ARGUMENT

I. Relator Is Not Entitled To An Order Prohibiting Respondent From Overruling Ford's Objections Because Ford's Failure To Request A Record Of The Hearing At Issue Leaves Nothing To Review In That Ford Has Failed To Meet Its Burden To Provide This Court With A Record Of The Alleged Error

State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 68 (Mo. App. 1997)

State ex rel. Ford Motor Co. v. Westbrooke, 12 S.W.3d 386, 391 (Mo. App. 2000)

State v. Gordon, 842 S.W.2d 577, 579 (Mo. App. 1992)

Volvo Financing North America, Inc. v. Raja, 754 S.W.2d 955, 957 (Mo. App. 1988)

It falls upon the shoulders of the Trial Judge to shepherd often contentious litigation on a crowded docket while maintaining appropriate levels of respect for not only the office but also the system. Please see *Restorative Services, Inc. v. Professional Care Center, Inc.*, 793 S.W.2d141, 144 (Mo. App. 1990). Discovery issues must be ruled regularly and with confidence that wide discretion will be afforded the Trial Judge. The standard of

review is therefore rightly one of great deference. Please see e.g. *Luster v. Gastineau*, 916 S.W.2d 842, 844 (Mo. App. 1996). The standard is not one of whether the reviewers, if faced with the same set of facts, would have made the same decision, but rather whether the decision is "an abuse of discretion amounting to an injustice" that is

"so arbitrary and unreasonable as to shock the sense of justice" of the reviewing Court. *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 68 (Mo. App. 1997). Missouri case authority reassures this state's trial judges that "a writ may not be utilized to infringe upon or direct a Trial Court's discretion." *State ex rel. Thomasville v. Beuford*, 512 S.W.2d 220, 221 (Mo. App. 1974); *see also, State ex rel. Kinder v. McShane*, 87 S.W.3d 256, 260 (Mo banc. 2002). Further, decisions allowing discovery will be accorded greater deference than a ruling to deny discovery. *Ferrell Gas, L.P. v. J. D. Williams, Jr.*, 24 S.W.3d 171, 175 (Mo. App. 2000).

Even greater deference should be accorded Respondent in this case, because Ford has provided no record of the hearing at issue. Numerous of the "facts" cited by Ford are without foundation in the record, and are instead allegations by Ford as to what occurred or speculation by Ford as to why it thinks Respondent may have taken certain actions. Please see e.g. Relator's allegations numbers 13 and 14, Relator's Brief pages 10-11.[1] Ford's allegations of what was said and done at the hearing and why it thinks the Trial Court made its rulings must all be disregarded as unsupported by the record. Please see *Rice v. State Department of Social Services*, 971 S.W.2d 840, 842 (Mo. App. 1998)(References in

[1] Further, Ford's fact number nine is incorrect, as plaintiffs in the underlying case filed their Motion to Compel and for Sanctions the day before Ford filed its late logs. Please see Exhibit G to Relator's Appendix, A47 (Certificate of service showing plaintiffs motion to compel and for sanctions was filed January 21, 2004); Id. at A53 (Late filed log showing filed the day after plaintiffs motion on January 22, 2004).

brief to alleged statements made off the record are "unsupported factual assertions" which violate Rule 84.04(h), and supply no basis for review); *Trout v. General Security Services Corp*., 8 S.W.3d 126, 130 (Mo. App. 1999)(Appellate Court "will not entertain unsupported contentions" and thus statements in a parties brief with no record support provide nothing to consider on review); *Thornton v. Deaconess Medical Center-West Campus*, 929 S.W.2d 872, 873 (Mo. App. 1996) (Reviewing Court cannot consider case based upon "facts alleged to have happened" but only on the record before it).

If a party claims that a trial judge erred, that party has the burden of documenting on the record the conduct or actions which it claims to be so arbitrary and unreasonable as to shock our common sense of justice. If Ford wished to complain of Respondent's Order, it was therefore "[i]ncumbent upon them to request that the record be preserved". *Volvo Financing North America, Inc. v. Raja*, 754 S.W.2d 955, 957 (Mo. App. 1988). Failure to request a hearing be held on the record leaves nothing to review as there is no proof to support the unsubstantiated claims of error. *Id.* Without a transcript of the proceeding complained of, there is no basis to review the trial court's decision, and the point must therefore fail. *Kuiper v. Busch Entertainment Corp*., 845 S.W.2d 697, 699-700 (Mo. App. 1993). Accord *State ex rel Callahan v. Collings*, 978 S.W.2d 471, 474 (Mo. App. 1998)(Where no record is made of the proceedings at the trial court, the party seeking review has failed its burden to provide all evidence necessary for determination of the issue raised); *Providian National Bank v. Houge*, 39 S.W.3d 552, 555 (Mo. App. 2001)(Burden of ensuring a transcript is made falls upon the party who later wishes to challenge the trial

court's action; failure to request a transcript therefore requires dismissal of the appeal as "unwarranted"); *Missouri Farmers Association v. Kemper*, 726 S.W.2d 723, 727 (Mo. banc 1987)(Party wishing to present claim of error must make sure that any ruling of which they complain is transcribed to be included in the record on appeal).

Therefore, there is a presumption in favor of the correctness of the Trial Court's ruling and, in the absence of a record of the hearing, the appellate Court must presume a reasonable basis for the Trial Court's decision. *State ex rel. Grimes v. Appelquist*, 706 S.W.2d 526, 529 (Mo. App. 1986); *American Refractories Co. v. Combustion Controls*, 70 S.W.3d 660, 664 (Mo. App. 2002) (as there was no record of the hearing, "the Trial Court's judgment is presumptively correct") *State ex rel. Cummings v. Witthaus*, 219 S.W.2d 383, 386 (Mo. 1949) (same). Without a record to assess, the appellate Court "is left with no basis upon which to prohibit that order" and thus the presumption of right action by the Trial Court requires dismissal of the writ. *State ex rel. Vanderpool Feed & Supply Co., Inc. v. Sloan*, 628 S.W.2d 414, 416-417 (Mo. App. 1982), *see also, State ex rel. City of Maplewood v. Crandall*, 569 S.W.2d 338, 340 (Mo. App. 1978).

Ford is well aware of this requirement, having failed to factually support its writ in *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 391 (Mo. App. 2000). In this prior proceeding, Ford argued facts "not supported by citations to the record", forcing the Court to remind Ford that it is Ford's duty to provide a record supporting the facts and arguments made on its petition. *Id.*, at 392-393. Without such a record, the Court could rule for Ford "only through speculation and not based on a record supported by facts." *Id.*

at 392-393.

Incredibly, Ford has even failed to provide this Court in its Appendix with several of the record items at issue. Ford is asking that this Court find an abuse of discretion in overruling its objections, objections which Ford has not placed before this Court for consideration. Ford has also failed to provide the Court with the Notice of Hearing it claims did not alert Relator to the fact that plaintiffs motions would be heard at the hearing. As Ford has failed to provide (a) the objections it claims was error to overrule, and (b) the notice which called for hearing plaintiffs motions, Respondent would respectfully suggest Ford has failed to provide "everything necessary" for determination of the questions presented, and thus "there is nothing before [this court] to review". *State v. Gordon*, 842 S.W.2d 577, 579 (Mo. App. 1992)(Quashing preliminary Order of Prohibition for failure of the Relator to provide necessary records for review)

As discussed more thoroughly in what follows, Ford's failure to make a record, either documentary or through testimonial evidence, was fatal to its contentions at the Trial Court level, as well it should be in this proceeding. Ford cannot show an arbitrary and shocking abuse of discretion, as there is no record before this Court supporting the claims of privilege which Ford seeks to uphold. Without evidentiary support in the record for the privileges claimed, it is impossible to show an error in overruling objections which Relator has not even supplied to this Court.

II. Relator Is Not Entitled To An Order Prohibiting Respondent From Overruling Ford's Privilege Claims Because Ford Failed To Meet Its

Required Burden Of Proof In That Ford Failed To Produce Any Evidence Supporting Any Element Of The Privilege Claims Asserted

Diamond State Ins. Co. v. Rebble Oil Co., 157 F.R.D. 691, 700 (D. Nev. 1994)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 70 (Mo. App. 1997)

State ex rel. Faith Hospital v. Enright, 706 S.W.2d 852, 856 (Mo. banc 1986)

A. Introduction

Ford posits the sole issue before this Court as one of whether the work product privilege is a perpetual privilege. While simplicity is the advocate's ally, Ford's simplistic approach in this case is belied by the record.

The ongoing nature of the work product privilege was but one issue properly before the Respondent in this case. In point of fact, several issues were presented to Respondent, and all called for hearing by Docket Order dated March 1, 2004. This Order called for hearing all pending motions. Please see Tab D Respondent's Appendix A142. Plaintiffs Motion to Compel Discovery and for Sanctions was pending at this time, as was Plaintiffs Supplemental Motion to Compel filed on February 17, 2004. The supplement contained 21 evidentiary attachments. Plaintiffs' Supplemented Motion was not responded to, nor were any of the evidentiary facts stated or attached contested by any formal briefing or filing proffered by Ford. Please see Allegation 12, Relator's Brief, page 10.

In Plaintiffs' Motion to Compel and for Sanctions and Plaintiffs' Supplemental Motion, plaintiffs challenged: (a) the sufficiency of the Privilege Logs, including their lack of factual completeness; (b) the lack of evidentiary support supplied by Ford in support of

the privileges claimed; (c) the lack of factual support for claiming any perpetual work product privilege; (d) the fact that most documents claimed by Ford as privileged, primarily engineering safety investigation of accidents, do not fall under any work product or attorney client privilege; and (e) the fact that Ford waived any privilege claims by disregarding the Court Order which required the filing of a complete and full privilege log, an order which Ford ignored. Please see Tabs A and B, Respondent's Appendix A1-9 and A21-48.

When the issues actually before Respondent are properly set forth, not only are Respondent's rulings not shocking, as is the standard for writ protection, they were, in fact, mandated by existing case authority. The issues properly phrased are:

1. Does a party who (a) fails to request a record of the hearing it complaints of; (b) fails to provide the objections to discovery it claims was error to overrule; and (c) fails to provide the notice of hearing it claims deficient, meet its burden to provide a record of everything necessary for determination of the questions presented?
2. Does a Trial Court abuse its discretion when it overrules privilege claims when the party claiming privilege produces no factual support proving the elements of the privilege after 16 months, three briefs, and two hearings in which to do so?
3. Does a Trial Court abuse its discretion when ordering production of engineering safety documents prepared while investigating known safety

hazards for business and engineering purposes?

4. Does a Trial Court fail to provide adequate due process to a party claiming privilege when it provides three rounds of briefing, three briefs, notice of a hearing on all motions, and two hearings in which to support the claimed privileges?

5. Does a Trial Court abuse its discretion when it finds engineering reports of other safety investigations do not qualify for work product when no evidence is offered that they are related to the litigation at issue?

6. Does the Trial Court abuse its discretion when finding that a party has waived any privilege claims by refusing to comply with the Court's Order establishing a time for presenting and filing privilege logs?

To find in favor of the writ Ford seeks in this case, the Court would be required to answer each and every one of the above questions in the affirmative. This is clearly not, nor should it become the law of Missouri. Thus, when the issues are properly framed and the appropriate standard of review is applied, Judge Westbrooke's ruling it is absolutely consistent with the record before him.

B. Ford Failed To Produce Any Evidence Supporting Any Element Of The Privilege Claims Asserted

Missouri has long recognized that privilege and qualified immunity claims can be utilized as an impediment to the truth. "Claims of privilege present an exception to the

general rule of evidence which provides that all evidence, material, relevant and confident to a judicial proceeding, shall be revealed as called for." *State v. Beatty*, 770 S.W.2d 387, 391 (Mo. App. 1989). Thus, Missouri law requires that any claim of privilege be "carefully scrutinized." *Id.* It is therefore the burden of the party claiming the privilege to prove each and every element of the privilege. *Please see, State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 70 (Mo. App. 1997), *State ex rel. Board of Pharmacy v. Otto*, 866 S.W.2d 480, 483 (Mo. App. 1993). Failure to prove any element of the claimed privilege causes the entire claim to fail. *State ex rel. Dixon* at 70. Missouri law thus squarely and completely places the burden of proving every element of privilege on the party claiming it. The requirement that a party asserting privilege and/or qualified immunity first establish the factual requisites for the privilege is both practically logical and legally essential. The rationale is best stated by the Court in *State ex rel. Dixon v. Darnold, supra*, as follows:

> Where the party opposing a discovery is in control of facts peculiarly within that party's knowledge, as was the case in the instant proceedings, and it is asserting a privilege or immunity from the discovery request, the burden of proof must necessarily shift from the proponent of discovery to the opponent of discovery. See 1 Mo. Civil Trial Practice § 5.61 (Mo Bar 2d Ed. 1988); *see also* discussion of blanket assertion of privilege in *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc. 1984).

State ex rel. Dixon at 70.

The potential injustice of allowing unsupported blanket privilege claims is readily

apparent in the case at bar. In response to plaintiffs' discovery at issue in this writ, Ford initially filed blanket objections in response to the Requests and Interrogatories.[2] Plaintiffs were thereafter required to file a Motion to Compel. At the first hearing on these objections Respondent ordered Ford to file privilege logs with "the necessary and sufficient information required by law." Please see Tab F Relator's Appendix A37. This order was entered November 17, 2003, and Ford was given until December 5, 2003, to do so. Id.

After being forced by Court Order to prepare a full and complete privilege log, Ford now admits that 45 of the 46 tests it was withholding based upon privilege had no legitimate privilege claim. Please see Relator's Appendix, Tab L A0120. Thus, for over 19 months Ford wrongfully withheld testing documents under a blanket assertion of privilege for which it had no proof. This revelation of impropriety narrowed down the issue as to what Ford was claiming to be protected to two basic sets of documents–(1) testing prepared by Mr. Mike Holcomb and (2) Ford engineering reports prepared when Ford engineers

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[2] Ford refused to provide a privilege log pertaining to the matters it unilaterally withheld. Ford's refusal to provide privilege logs was contrary to accepted practice and case authority holding such failure to be a waiver of privilege. *Please see State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. banc. 2000)(regarding practice); *In re: Grand Jury Subpoena* 274 F.3d 563, 577 (1st Cir. 2001); and *General Motors v. McGee*, 837 So.2d 1032-1033 (Fla. App. 2003), both holding failure to provide a privilege log a waiver of the claimed privilege.

investigated Bronco II accidents. The logs containing these claimed privilege documents were filed long after the Court had ordered Ford to produce fully-compliant privilege logs without Ford having received a Court-authorized extension. After receipt of the logs, plaintiffs filed two Motions to Compel and for Sanctions. Plaintiffs' Supplemental Suggestions with attachments were filed on February 17, 2004, thus providing Ford notice of its log deficiencies for approximately one month before the March 15, 2004, hearing date. Please see Tab B Respondent's Appendix A21-48. Specifically as to the work product privileges claimed, Ford's log sets forth nothing about whether litigation was anticipated, whether litigation was threatened, whether the inspection was made available to third parties, such as the NHTSA investigators, who instructed or authorized the investigation, or what use Ford made of the investigation. Please see Tab B Relator's Appendix A48-91. After receipt of plaintiffs' suggestions, Ford did nothing to support the claimed privileges. It filed no affidavits and, despite having received notice by docket entry from Respondent that all motions would be heard on March 15, 2004, Ford presented no evidence concerning any of the documents or testing that it claimed protected as work product or under the attorney-client privilege. Please see allegation 12, Relator's Brief page 10; Admission Relator's Brief page 22.

The privilege log constituted nothing other than bare allegations of privilege with no evidentiary support whatsoever, much akin to the situation faced in both *State ex rel. Dixon v. Darnold, supra*, and *State ex rel. Faith Hospital v. Enright*, 706 S.W.2d 852, 856 (Mo. banc 1986). Both cases hold that bare allegations claiming that identified documents are

privileged are insufficient to support any privilege claim. In *State ex rel Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997) the defendant supported its claims of privilege at a discovery hearing with only briefs and argument, producing no evidence. The Court of Appeals Southern District held that argument of counsel was wholly insufficient and thus was a failure of proof causing all of the claimed privileges to fail. *Id.* Having failed to submit affidavits or testimony proving the essential elements of the privilege claimed, the Court held failure to overrule objections in a situation identical to the case at bar was an abuse of discretion. *Id.* At 71.

In *State ex rel. Faith Hospital v. Enright*, this Court in a strikingly similar situation held that:

> the record before this Court contains only bare allegations that these reports were prepared [in anticipation of litigation]. Relators have made no attempt to describe the report or the circumstances under which they were made. Blanket assertions of the work product privilege will not suffice to invoke its protection. *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc 1984). Under the present circumstances, prohibition is unavailable for these incident reports.

Id. At 856. Under Missouri law Respondent could not uphold claims of privilege without the necessary proof which Ford has confessed it failed to provide. Likewise, this Court cannot find an abuse of discretion as no record evidence exists supporting the objections Ford alleges was error to overrule.

Ford complains that the Trial Court did not review the documents *in camera* or set

yet another hearing. These allegations beg the question--what did Ford expect to occur at this, the second hearing on these privilege claims? Ford was aware well before the hearing that plaintiffs challenged the factual inadequacies of the logs for substantive review before the Court. Please see Exhibit 4 (Tab A4) to Plaintiffs Motion to Compel and For Sanction, Respondent's Appendix A13; Plaintiffs Supplemental Motion to Compel, Respondent's Appendix A21-48. Respondent had noticed for hearing all pending motions after Ford requested the first hearing be moved. Respondent's Appendix Tabs C and D, A141-142. The Order was not a scheduling Order it was a hearing Order. These matters had been ongoing for over 16 months, and had already required two hearings and numerous briefs. Ford knew the issues were those set forth in plaintiffs' three motions to compel, the last of which was filed approximately one month before the hearing. Indeed, the record reflects that Ford knew the gravity of the hearing, having assembled counsel from four different states. Please see Tab K Relator's Appendix A118. This counsel however solely provided argument, of which there is no record and which has been held to be completely and totally insufficient to support factual privilege claims. *See State ex rel. Dixon v. Darnold*, *supra*.[3]

The exact argument now posited by Ford (that *in camera* review is mandatory and not discretionary) has been rejected by multiple Courts. In *Diamond State Ins. Co. v.*

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[3] Ford's allegations should also be rejected as it had none of the documents at the hearing. Thus, even had Judge Westbrooke wished to review the documents *in camera*, Ford's decision not to have the documents present would have precluded his doing so.

Rebble Oil Co., 157 F.R.D. 691, 700 (D. Nev. 1994), the Court overruled claims of privilege on the basis that the proponent had not met its burden of proof. The Court rejected a last-minute request for *in camera* review as it "is not to be used as a substitute for a party's obligation to justify its withholding of documents." *Id.* "*In camera* review is generally disfavored" and "should not replace the effective adversarial testing of the claimed privileges and protections." *Id.* In denying the exact claim made by Ford in this case, the Court held "[r]esort to *in camera* review is appropriate **only** after the burdened party has submitted detailed affidavits and other evidence to the extent possible. *Id.*, (emphasis added).

Likewise, *In Re: General Instrument Corp. Securities Litigation*, 190 F.R.D. 527, 532 (N.D. Ill. 2000), the Court held that "defendants are under the mistaken impression either that plaintiffs must prove documents are not privileged, or that it is the Court's burden to establish the applicability of the privilege as to defendant's documents." In rejecting the exact argument Ford makes before this Court as unsound, the Court held it would not at the "11th hour" grant an *in camera* inspection as defendant "has had ample opportunity to carry its burden as to establishing the privilege and has failed." *Id.*

Ford's proposed rule that Trial Court's are required to do mandatory *in camera* review when a party has failed to meet its burden of proof to support claims of privilege has been universally rejected. Please see e.g. *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 642 (S.D. N.Y. 1991) (Party claiming privilege cannot be allowed to "shift the burden onto the Court by submitting all of the documents for inspection *in camera*"); *Mobile Oil*

Corp. v. Dept. of Energy, 102 F.R.D. 1, 6-7 (N.D. N.Y. 1983) (Where documents number into the hundreds or thousands of pages "it is unreasonable to expect a trial judge to do as thorough of a job of illuminating and characterizing as would a party interested in the case "); *Pete Rinaldi's Fast Foods, Inc. v. Great American Ins. Co.*, 123 F.R.D. 198, 203 (M.D. N.C. 1988) (Party does not meet its burden by submitting a voluminous batch of documents for *in camera* review as the party claiming privilege cannot "shift its burden to the Court by expecting the Court to review each document of a thick file") *P.H.E., Inc. v. Department of Justice*, 983 F.2d 248, 253 (D.C. Cir. 1993) (*In camera* review is generally disfavored and cannot be used as a substitute for a party's obligation to justify the privilege it claims); *Wiener v. F.B.I.*, 943 F.2d 972, 979 (9th Cir. 1991) (*In camera* review is only proper after the party claiming privilege has submitted appropriate affidavits supporting the privilege); *Delco Wire & Cable Inc. v. Weinberger*, 109 F.R.D. 680, 688 (E.D. Pa. 1986) (*In camera* review is not sufficient to meet defendant's burden of proving elements of claimed privilege); *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 93-94 (D. Del. 1974) (Claims of privilege should be supported by affidavits as submitting documents *in camera* is not a "suitable situation"); 10 *Fed. Proc. L. Ed.* § 26:78 (*In camera* inspection "is not, nor should it be, automatic." Such an examination "may be very burdensome" and thus "where the documents number in the hundreds or even thousands of pages, it is unreasonable to expect the trial judge to do as thorough a job of illuminating and characterizing as would a party interested in the case.").

Ford's citations of Missouri decisions where *in camera* review has been held to be

within a Trial Court's discretion are not on point. These cases stand for the unexceptional proposition that a Trial Court has discretion to review documents *in camera*, and not as Ford posits that a Trial Court is required to review documents *in camera*. In the Missouri cases cited by Ford, the issue was not failure of a party to meet its required burden of proof. Indeed, the cases cited involved privileges held by parties not even before the Court who could not have failed to meet their burden of proof. *Please see e.g. State ex rel. Lester E. Cox Medical Center v. Keet*, 678 S.W.2d 813, 815 (Mo. banc 1984)(Trial Court had discretion to examine *in camera* documents to protect the interest of non parties to the case); *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 79-80 (Mo. banc 1984)("Respondent has the discretion to examine and protect the identities and privacy of relator's clients" who were not before the Court) (emphasis added); *Edwards v. Missouri State Board of Chiropractic Examiners*, 85 S.W.3d 10, 23 (Mo. App. 2002) (Noting that Administrative Hearing Committee exercised discretion in reviewing diaries of a non party witness to a disciplinary proceeding to protect the witness's privacy rights to non relevant matters).[4]

The same holds true for the cases cited by Ford on page 25 of its Brief where

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[4] The holding of *Weisel Enterprises, Inc. v. Curry*, 718 S.W.2d 56 (Tex. 1986) cited by Relator does not support Ford at all. The holding of *Weisel* was that the Trial Court abused its discretion by not ordering the production of documents from a privilege log to the plaintiffs when the defendant offered no evidence to support the privileges claimed, and the Trial Court did not review the documents *in camera*. *Id*. at 57.

privilege claims for material identical to the Design Analysis documents at issue were overruled. Please see e.g. *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439, 441 (S.D. N.Y. 1990)(Noting that Court "with the agreement of counsel" had reviewed the documents in question; overruling identical claims of work product to that made by Ford in this case). None of these cases even hint that *in Camera* review is required before a Court can overrule unsupported claims of privilege. Ford's citation to *Janicker v. George Washington University*, 94 F.R.D. 648, 651 (D.C.D.C. 1982) is just as puzzling, given that no discussion at all is had about *in camera* review, and the only holding of the Court is that documents identical to Ford's Design Analysis reports are not entitled to protection.

Likewise, *Henson v. Wyeth Laboratories Inc*., 118 F.R.D. 584, 586 (W.D. Va. 1987) cited in Ford's brief refutes the argument that plaintiffs need to show "the requisite need" whether or not Ford has met the burden of proving the privilege initially. Ford throughout its briefing has continually confused whose burden it is to initially show protection, arguing that Respondent committed error by not requiring "Plaintiffs to articulate a basis for challenging each item listed in the privilege logs or to show substantial need for the work product materials". Relator's brief, page 11, allegation 14. Please see also Relator's brief at page 21, footnote 4 (Arguing it was plaintiff's burden to introduce evidence disproving Ford's blanket claims of privilege).

This argument turns Missouri law upside down. It is Ford's burden to prove all of the elements necessary for the privilege or protection it claims. *State ex rel Dixon v. Darnold* Supra at 70. If the party seeking protection fails to do so, the discovery must be

produced. *Id.* Until Ford presents evidence proving the claims, plaintiffs have no burden at all in regard to such documents because no privilege exists. *Henson v. Wyeth Laboratories Inc* at 587 (The burden is upon defendant to prove each necessary element of the privileges claimed). The issue of need and inability to obtain the documents arises only after Ford has met its burden, and proven the necessary elements of work product. The quote from *Henson* cited by Ford makes this proposition abundantly clear. *Id*. at 586 ("The Court must first determine the material sought to be protected falls within the purview of the applicable doctrine, **and, if so,** whether the requisite need or cause has been demonstrated for avoidance of doctrinal protection."), emphasis added. Accord *In Re: General Instrument Corp. Securities Litigation*, 190 F.R.D. 527, 532 (N.D. Ill. 2000)("[d]efendants are under the mistaken impression either that plaintiffs must prove documents are not privileged, or that it is the Court's burden to establish the applicability of the privilege as to defendant's documents), emphasis added.

Ford is asking this Court to establish a new rule in the state of Missouri. This new rule would require that every Trial Court in the state review *in camera* hundreds or even thousands of documents whenever a party fails to offer any substantive evidence for the privileges it claims. This new rule is not only wholly unsupported in Missouri law, but is also unsupported in common sense. The burden to prove exceptions to the rules of discovery is Ford's. Ford cannot foist this burden upon the Trial Court by failing to provided necessary evidentiary support for claims of protection. It is an odd rule Ford proposes, wherein the Trial Court is punished for Ford's discovery transgressions.

Missouri law, in keeping with both the Federal Rules and the near unanimous State Court jurisdictions, holds the burden to establish privilege rests upon the party seeking to withhold the evidence. The Court should not change this well established rule merely because Ford has failed to satisfy its mandates.

III. Relator Is Not Entitled To An Order Prohibiting Respondent From Ordering Production Of The Documents At Issue Because They Do Not Qualify For Work Product Or Attorney Client Protection In That The Documents Consist Of Reports Prepared By Engineers For Safety And Not Litigation Or Legal Advice Purposes And The One Set Of Tests Have Been Shared With Third Parties

St. Louis Little Rock Hospital, Inc. v. Gaertner, 682 S.W.2d 146 (Mo. App. 1984)

Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980)

State ex rel. American Economy Ins. Co. v. Crawford, 75 S.W.2d 244, 245-247 (Mo. banc 2002)

After confessing that 45 out of 46 test reports originally claimed as privileged were, in fact, not, the documents at issue involve two separate categories–neither of which are privileged. The first involves testing done by an individual named Mike Holcomb. The second type of document involves Ford in-house engineering documents produced by the Design Analysis Department at Ford. Ford's claim that the in-house engineers' reports are consultant reports is simply factually wrong. Judge Westbrooke, based upon the record

before him, properly applied the law. Reference to case authority shows even more clearly the deficits in Ford's presentation and clearly shows their failure to prove the elements necessary to claim privilege.

A. *Mike Holcomb Testing*

The issue concerning the Mike Holcomb testing is simple. In Ford's privilege log, it placed an asterisk beside the identification of this testing and represented to the Court that it did not know whether this testing had been shared with third parties or not. Please see Relator's Appendix Exhibit H, A090-091. In order to maintain either a work product or attorney-client privilege, it is essential to prove that the documents or testing at issue have not been shared with others. *Please see State v. Longo*, 789 S.W.2d 812, 815 (Mo. App. 1990)(If third party is privy to attorney client communication, any claim of privilege is vitiated); *State ex rel. American Economy Ins. Co. v. Crawford*, 75 S.W.2d 244, 245-247 (Mo. banc 2002)(Expert's opinion disclosed in prior case to party opponent waives any claim of work product protection in all future cases).

In *State ex rel. American Economy Ins. Co. v. Crawford* the expert and his opinions were disclosed in a prior case in Kansas. Later, a case was filed in Missouri, and the defendant sought to keep the same expert and his opinions secret as a "consulting expert". This Court held that once the expert and his opinions had been disclosed in a prior case, the waiver is effective despite an attempt in a later case to re-designate the expert a non-testifying consultant. *Id*. At 247. "The bell has been rung and cannot be unrung." *Id.* At

246.

Further, Ford in its privilege log identified nothing that would suggest this testing was in contemplation of litigation, as no case or matter name is identified for Mr. Holcomb's testing. Please see Relator's Appendix A90. Mr. Holcomb's relationship to the case is not identified, nor is there any identification that he is an expert consultant, and not a testifying expert. Id. Indeed, the likely reason Ford did not attempt to offer such evidence is that Mr. Holcomb is in fact a testifying expert and not a consultant on the Bronco II. Please see Tabs H and I Respondent's Appendix, A152-159. Mr. Holcomb has even testified about the very testing Ford seeks to keep hidden in this case. Id. Based upon Ford's admission that it could not meet the elements of the privilege, Judge Westbrooke had no choice but to overrule Ford's objection.[5]

B. *In House Engineering Analysis*

As to Ford's in-house engineers' investigative reports, it was plaintiffs' position in their Motion to Compel that these incident reports were prepared as part of Ford's ongoing duty to monitor the safety of their product. Please see Tab B Respondent's Appendix A27-

[5] Ford also objected to the production of this testing on the basis of the attorney client privilege. No communication with a client is identified, however, but instead only expert testing. As such, it does not qualify for protection. Please see *State v. Carter*, 641 S.W.2d 54, 57 (Mo. 1982)("The privilege is limited to communications between the attorney and the client" and thus "does not extend" to communications with an expert or his work).

34. These investigative reports date back to 1985, and span a period of time when Ford was asked by the National Highway Transportation Safety Administration to investigate and supply data concerning the Bronco II. Respondent's Appendix Tab B(1) A58-59. As part of its required commitment to safety, Ford investigated Bronco II accidents. Respondent's Appendix Tab B A27-34; Tab B(1) A58-59. The reports written by the engineers, while available should litigation arise, are simply incident reports that fail to qualify as attorney-client or work product privilege, certainly under the record before Judge Westbrooke.

Perhaps the most frequently cited, and most comprehensive, formulation of the elements of the attorney-client privilege is that by Judge Wyzanski in *United States v. United Shoe Machinery Corp*., 89 F. Supp. 357, 358-59 (D. Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a Court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.
>
> Although a corporation may claim an attorney-client privilege with respect to some

communications with in-house lawyers, it is also universally held that business communications cannot be insulated from discovery by virtue of the mention of an attorney's name, or their being funneled through the legal department. To avoid the exact abuse Ford is attempting to make in this case, Courts when faced with a claim such as this regarding in-house counsel "place a heavy burden on the proponent" to make a clear showing that the document is protected. *Amway Corp. v. Proctor & Gamble Co.*, 2001 WL 1818698 (W.D. Mich. 2001), accord *Allegheny Ludlum Corp. v. Nippon Steel Corp.*, 1991 WL 61144 (E.D. Pa. 1991) ("Courts have remained firm in denying privileged status to documents that contain essentially technical or business data and are not primarily legal in nature").

The following cases are illustrative of this general refusal to allow corporations to hide business activity behind a cloak of secrecy:

> The communication must be made by the client to the attorney acting as an attorney and not, *e.g.*, as a business advisor. In sum, attorneys do not "act as lawyers when not primarily engaged in legal activities."
>
> In addition, the communication must have as a primary purpose the securing or providing of legal services. Thus, documents that are reports "of general corporation business decisions as opposed to legal advice based upon confidential information" are not privileged.

Barr Marine Products Co., Inc. v. Borg-Warner Corp., 84 F.R.D. 631, 634-35 (E.D. Pa. 1979).

The attorney-client privilege is triggered only by a client's request for legal, as contrasted with business advice, and is "limited to communications made to attorneys solely for the purpose of the corporation seeking legal advice and its counsel rendering it." When the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved.

Hardy v. New York News, Inc., 114 F.R.D. 633, 643-44 (S.D.N.Y. 1987).

Neither the existence of an attorney-client relationship nor the mere exchange of information with an attorney make out a presumptive claim. There must be a communication in intended confidence for the purposes of obtaining an opinion on law or legal services, or relating thereto.

Research Institute for Medicine and Chemistry, Inc. v. Wisconsin Alumni Research Foundation, 114 F.R.D. 672, 675-76 (W.D. Wis. 1987).

Because of the resulting obstruction to the truth-finding process, however,

> the attorney-client privilege is construed narrowly. This is especially so when a corporate entity seeks to invoke the privilege to protect communications to in-house counsel. Because in-house counsel may play a dual role of legal advisor and business advisor, the privilege will apply only if the communication's primary purpose is to gain or provide legal assistance. Business communications are not protected merely because they are directed to an attorney, and communications at meetings attended or directed by attorneys are not automatically privileged as a result of the attorney's presence. Rather, the corporation "must clearly demonstrate that the communication in question was made for the express purpose of securing legal not business advice."
>
> *Kramer v. Raymond Corp.*, 1992 WL 122856 (E.D. Pa. 1992), *quoting*, *Westinghouse v. Republic of the Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991)

The engineering reports at issue in the instant case are analogous to the loss prevention report at issue in *St. Louis Little Rock Hospital, Inc. v. Gaertner*, 682 S.W.2d 146 (Mo. App. 1984). There the hospital had a policy of preparing an "Incident/Accident" report on a routine basis for the purpose of preventing future accidents. The plaintiffs sought discovery of the "Incident/Accident" report pertaining to the wrongful death of their decedent. The hospital resisted production of the report claiming that it fell within the attorney-client privilege in that the report had been communicated to the hospital's insurer

after the incident. The appellate Court rejected the hospital's argument, stating:

> In order to be privileged, a communication between a client and his attorney, or between an insured and his insurer, must be within the context of the attorney-client relationship. In other words, the purpose of the communication must be to secure legal advice from the client's attorney. The purpose of the incident report was not to enable relator or its insurer to obtain legal advice, but rather to help relator reduce the number of accidents at its facility . . . .
>
> Instead of being prepared with the intention of seeking legal advice, the incident report was compiled in the ordinary course of relator's business as a means of accident prevention, and is, therefore, not privileged. That the incident report may have been subsequently used by relator's attorney or insurer is irrelevant. **A document which is not privileged does not become privileged by the mere act of sending it to an attorney.**

Id. at 150-51, emphasis added. Please see also *Curtis v. Indemnity Co. of America*, 37 S.W.2d 616, 625-626 (Mo. 1931)(Investigative reports prepared in ordinary course of business shortly after accident investigated not protected from discovery, despite their later being forwarded to defendant's attorneys).

Similar incident reports were at issue in *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987). In *Simon* the report was prepared by non-lawyers utilizing information

provided and relied upon by the company lawyers. The Court held that the document was not privileged because the risk management documents were not communicated to Searle's attorneys for the purpose of seeking legal advices but were produced and disseminated in the ordinary course of business and were provided to the attorneys in their capacities as business advisors. Thus, privilege "does not protect client communications that relate to only business or technical data" as "Legal departments are not citadels in which public, business or technical information may be placed to defeat discovery" *Id.* at 403.

In another similar case, the Court in *Soeder v. General Dynamics Corp.*, 90 F.R.D. 253 (D. Nev. 1980) held investigative reports of accidents are not protected under work product. In *Soeder*, the defendant typically investigated whenever it got notice one of its planes had crashed. The reports consisted essentially of "detailed, expert findings regarding the crash." *Id*. at 255. The defendant claimed the crash investigations were protected, as they anticipated it was possible litigation could come from any plane crash. In rejecting this argument and ordering production of the reports, the Court held:

> Certainly litigation is a contingency to be recognized by an aircraft accident. However, given the equally reasonable desire of Defendant to improve its aircraft products, to protect future pilots and passengers or its aircraft, to guard against adverse publicity in connection with such aircraft crashes, and to promote its own economic interest by improving its prospects for future contracts for the production of such aircraft, **it can hardly be said that Defendants "in house" report is not prepared in the ordinary course of**

business.

Id. at 255,emphasis added.

Everything above can be equally applied to Ford's standard investigations into Bronco II rollovers when notified. Ford's design engineers told the company that as designed the Bronco II was unstable and would rollover in the field as it had on Ford's test track. Tab B(1) Respondent's Appendix A55-58. When Ford received notice of post sale rollovers its engineers investigated and reported back to the company. Thus, Ford's cannot claim its "in house report is not prepared in the ordinary course of business" and as such must be produced. *Soeder* at 255. Accord *Miles v. Bell Helicopter Co.*, 385 F.Supp. 1029, 1032-1033 (N.D. Ga. 1974) (Investigations performed by Bell Helicopter when three helicopters crashed were not protected, as investigations performed on the safety of product are done in the ordinary course of business).

Fine v. Facet Aerospace Products Co., 133 F.R.D. 439 (S.D.N.Y. 1990), is also on point. There Cessna claimed privilege over an internal report entitled "Aircraft Fuel Water Tolerance," created by Cessna to detail the history of problems with its aircraft's fuel system, testing that had been performed, and possible solutions to fix the problem. The claim of privilege was based upon the fact an attorney had provided some of the information which went into the report. The report itself was drafted by Cessna's engineering department for the purpose of risk management and consisted primarily of the simple categorization of claims against Cessna. In denying privileged status to the report, the Court concluded that the report was not a communication made in connection with the

rendering of legal advice but was rather a business communication. *Please see also Brennan v. Walt Disney Productions Co.*, 1987 WL 15919 (D. Del. 1987) (Accident reports prepared by Disney serve broader general business use, and must be produced, despite knowledge that some of the accidents may result in lawsuits); *Henson v. Wyeth Laboratories, Inc*., 118 F.R.D. 584, 586-587 (W.D. Va. 1987) (Risk management documents do not fit under the "penumbra of the trial preparation and work product doctrines," and thus must be produced); *Janicker v. George Washington University*, 94 F.R.D. 648, 650 (D. D.C. 1982) (**"If in connection with an accident or an event, a business entity in the ordinary course of business conducts an investigation for its own purposes, the resulting investigation report is producible in civil pretrial discovery."**), emphasis added.

The party asserting the attorney-client privilege bears the burden of establishing each and every element of the privilege. "Initially, we note that the party who claims the benefit of the attorney-client privilege has the burden of establishing the right to invoke its protection." *Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985); *Hutchinson v. Steinke*, 353 S.W.2d 137, 144 (Mo. App. 1962). Thus, Ford must come forward with proof, and not just the conclusory statements which it offered in this case, that the incident reports in question were provided to in-house counsel for the purpose of seeking legal advice. The reports on what little information has been provided are nothing more than routine risk management documents which are unprotected according to the authorities cited herein. Ford has failed to prove otherwise.

The above case authority was all cited and argued in Plaintiffs' Supplemental Motion and Suggestions to Compel filed February 17, 2004, approximately one month before the hearing of which Ford now complains. Please see Tab B Respondent's Appendix A21-48. After receipt of the Suggestions and this case authority, Ford did nothing to support its privilege claim. No affidavits were filed indicating how these engineering reports were different than the type of reports discussed in the above cases. No affidavits or testimony was produced indicating that these incident reports were used solely or at all for litigation, rather than for safety. No documents were filed indicating that any of the documents were even written in anticipation of litigation, and no evidence was produced by Ford showing any relation to legal advice as opposed to business advice. In short, nothing was done to respond to plaintiffs' assertions, either on the factual or legal front.

Furthermore, Ford was aware, as was Judge Westbrooke, that the exact issue concerning Ford's incident investigations had been ruled contrary to Ford by the Honorable John D. Wiggins, Circuit Judge of Phelps County, in the case of *Boatmen's Trust Company v. Ford Motor Company, et al.* After Judge Wiggins overruled Ford's objection to producing the same design analysis engineering incident reports and denying their assertion of work product, Ford moved Judge Wiggins for reconsideration.[6] Judge Wiggins, again, overruled Ford's request stating:

The Court finds that the procedure of routing such complaints through the

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[6] The Design Analysis reports at issue before Judge Wiggins involved the same investigative activities by the same department of Ford but dealt with a seatbelt defect.

office of general counsel and the reports generated in response thereto were not investigatory but appear to be a means of affirming a position established by the office of general counsel in response to such complaints and therefore were not made in anticipation of litigation and are not work product. Motion to Reconsider is denied.

Please see Tab B(11) Respondent's Appendix A109. Ford sought relief both through the Southern District Court of Appeals and this Court, both Courts rejected Ford's Writ of Prohibition. Respondent's Appendix Tab B(12-14) A110-112. Thus, Judge Westbrooke's exercise of his discretion is consistent with another Missouri Trial Court on this exact same issue.

IV. Relator's Second Point (Point B) on Appeal Should be Denied as Relator Is Not Entitled To An Order Prohibiting Respondent From Overruling Ford's Objections To Discovery Because (A) Ford Has Failed To Properly Preserve This Issue For Review And (B) Relator Received More Than Adequate Process In That Ford Filed Three Briefs and Attended Two Hearings Before The Court Overruled Ford's Objections

Laubinger v. Laubinger, 5 S.W.3d 166, 176 (Mo. App. 1999)

Missouri Rule of Civil Procedure 44.01(d)

Spears v. Capital Region Medical Center, Inc., 86 S.W.3d 58, 63 (Mo. App. 2002)

A. Ford Has Failed To Properly Preserve This Issue For Review

Ford's second point on appeal is that Respondent's ruling violates due process. This

argument, however, is raised for the first time in this Court. Ford made no such argument at the Trial Court level, nor has Ford provided evidence it made any such argument in its briefing before the Missouri Court of Appeals Southern District. It is Ford's obligation to provide the Court with a record showing it preserved its "due process" argument. Please see e.g. *Daniel v. Board of Curators of Lincoln University*, 51 S.W.3d 1, 6 (Mo. App. 2001).

Likewise, Ford does not identify what "due process" it claims was violated, citing neither the specific provision it claims violated from either the Federal Constitution, or the Missouri Constitution, or both. This failure is compounded by not included the text or section it claims violated in its point on appeal. Ford has also failed to provide the complete text of whichever due process clause it claims violated in its Appendix, in violation of Rule 84.04(h)(2). Finally, Ford's second point on appeal does not provide the evidence or specific facts which it claims supports the rule of law Ford suggests should have been applied.

Any of these defects is a failure to preserve this issue for review. *Please see* e.g. *Spears v. Capital Region Medical Center, Inc*., 86 S.W.3d 58, 63 (Mo. App. 2002) (Preservation of constitutional issue is stringent, requiring that the issue first be raised in the lower Court, be preserved at all levels of appellate review, and requires that the appellant "designate specifically the constitutional provision claimed to have been violated by explicit reference to the article and section or by quotation of the provision itself"); *Adams v. Children's Mercy Hospital*, 832 S.W.2d 898, 908 (Mo. banc 1992) (Party failed

to preserve due process argument raised for first time in this Court); *Hollis v. Blevins*, 926 S.W.2d 683 (Mo. banc 1996) (Party waived due process challenge when it failed to raise constitutional issue with lower Court); *State v. Rogers*, 95 S.W.3d 181, 185 (Mo. App. 2003) (Constitutional arguments are of such dignity and importance that "raising such issues as an afterthought in the brief on appeal will not be tolerated"); *J.A.D. v. F.J.D. III*, 978 S.W.2d 336, 339 (Mo. banc. 1998)(Failure to cite section or quote constitutional provision in point on appeal leaves nothing to consider); *Williams v. Williams*, 55 S.W.3d 405, 410 (Mo. App. 2001)(Point on appeal must include reference to facts in evidence which show how the Trial Court erred in relation to the case). As such, Respondent respectfully suggests that this Court need not review this point.

B. *Ford Received More Than Adequate Process Through The Filing of Three Briefs and Attending Two Hearings*

Ford's second point on appeal also fails substantively when the extensive process Ford in fact received is considered. Ford first received the process of notice of a motion to compel all documents. Please see Tab C Relator's Appendix A20-26. Ford then received the process of filing two briefs in response to plaintiffs' initial Motion to Compel which challenged the failure to produce any evidence to support claims of privilege. Relator's Appendix Tabs D and E, A27-36. Ford in this initial round of briefing had the opportunity, but chose not to preserve its privilege claims by filing the required proof through affidavits, testimony, or documentary exhibits. Id. Ford then had the process of a hearing on Plaintiffs' first Motion to Compel, at which Ford could have, but chose not to

introduce any evidence. Relator's Appendix Tab F A37. Ford then received the process of an Order by the Court to produce full and complete privilege logs. Id. After Ford failed to comply with this ruling, Ford received the process of notice of filing of plaintiffs second motion to compel, along with the opportunity to respond by briefing to same. Relator's Appendix Tab G A39-47. Again, Ford chose to offer no evidence in support of its claims in this third brief. Relator's Appendix A107-117.

After a hearing, and two rounds of briefing (totaling three written suggestions by Ford), Ford was then afforded the additional process of having a full month to file a written response to Plaintiffs Supplemental (third) Motion to Compel filed on February 17, 2004. Again, Ford chose not to file any written response to this motion. Ford then received the process of a notice of hearing twelve days in advance of the hearing date calling up outstanding motions. *Please see* Tab D Respondent's Appendix A142. This more than complied with Missouri Rules and due process. *Please see* Missouri Rule of Civil Procedure 44(d) (Notice for hearing must only be given five days before the hearing); *Surheide-Hermann, Inc. v. London Square Development Corp.*, 504 S.W.2d 161, 165-166 (Mo. 1973)(Notice of hearing mailed five days before hearing, which failed to identify the time of the hearing, or the number of the division of the circuit court where the hearing will be held, satisfies due process; affirming default judgment).

Having received this notice of the second hearing for all motions in twelve days, Ford likewise chose to file no affidavits in support of its claims of privilege with the Trial Court as authorized by Missouri Rule of Civil Procedure 44.01(d). Finally, a second

hearing was held, where Ford again had an opportunity to offer evidence, testimony or affidavits. Despite having four attorneys present, including an attorney from Ford's Office of General Counsel who presumably could have offered testimony as to the privileges claimed, Ford again chose to offer no evidence in support of its claims of privilege.[7] Please see Tab K Relator's Appendix A118-119.

Ford asks that this Court rule three potential rounds of briefing, three written suggestions, and two hearings before the Trial Court were not sufficient process in this case. Not surprisingly, Ford cites no authority for such a proposition. Ford likewise offers no explanation how due process is violated if the Trial Court does not ask again that Ford do what is required under Missouri law; i.e. respond to a motion on file for a month, and provide the necessary support for its own claims of privilege. Indeed, the law is that the

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[7] Ford now objects to two judicial Order's proffered by plaintiffs to the Trial Court. These exhibits were recent Orders finding that Ford had violated rulings. Please see Tab E, *Tennin v. Ford Motor Co.*, Circuit Court of Hinds County, Mississippi, Respondent's Appendix A143-144 (Holding Ford in contempt where it "blatantly and intentionally ignored the Order of this Court" in failing to provide support for privileges claimed by date set in prior Order); Tab F, *City of Centerville v. Ford Motor Co.*, Circuit Court of St. Clair County, Illinois, Respondent's Appendix A145-147 (Finding Ford deliberately and willfully violated an Order of the Court). Ford cites no record that it objected to the provision of these Orders to the Trial Court, for the simple reason no such objection was made at the hearing.

opportunity to file a single written brief fully complies with due process. *Please see* e.g. *Laubinger v. Laubinger*, 5 S.W.3d 166, 176 (Mo. App. 1999) (Finding one round of briefing sufficient process as all that is required to satisfy due process is an opportunity to "present reasons, either in person *or in writing* why a proposed action should not be taken"), emphasis in original. Ford offers no explanation why when given a month to file a response it did nothing, or how Ford's failure to avail itself of the opportunity to file a written response constitutes a denial of due process.

Ford's argument that due process required yet another chance to supplement its logs is also contrary to established law.[8] Please see e.g. 8 Wright & Miller, Fed. Prac. & Proc. Civ.2d §2016.1 (2004)(Failure to properly assert privilege in a timely manner results in losing the protection claimed); Advisory Committee Notes to the 1993 amendments to Rule 26(b)(5) of the Federal Rules of Civil Procedure (Noting party who fails to timely disclose necessary information for privilege claims are subject to sanction and loss of the privilege).

Again, Ford's case citations are to situations where a Trial Court has exercised its discretion to allow a party to amend inadequate logs. This is altogether different from the proposition offered by Ford, i.e. that a Trial Court has no discretion in such situations. Please see e.g. footnote 6, page 27 of Relator's Brief; *Eppard v. Kelly*, 2003 WL 23162316 (Va. Cir. Ct. 2003)(Court in its discretion allowing supplementation of

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[8] Similar to Ford's other claimed errors, there is no record of Ford requesting an opportunity to amend its logs at the hearing.

inadequate logs, while noting it normally would be inclined to compel the items be produced without allowing supplementation); *Chevron v. Peuller*, 2004 WL 224579, *4 (E.D. La. 2004)(Trial Court exercising its discretion to set procedures for privilege claims); *Wilson v. Foti*, 2004 WL 856733 (E.D. La. 2004)(Trial Court allowed amending of privilege log in its discretion rather than production of documents only because "nothing would be gained by producing these additional contracts in their entirety" as they were identical to documents previously produced).

Ford had almost a month between the filing of Plaintiff's Supplemental Motion to Compel in which it could have amended its privilege logs if it was so inclined. Again, Ford chose to leave its inadequate logs as they were. Ford was also given repeated chances to support its claims of privilege and yet chose not to. Ford received more than adequate process, it simply chose not to avail itself of the process provided. Ford's objections were thus properly overruled at this second hearing. Please see e.g. *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 71 (Mo. App. 1997)(Remanding with Order to Trial Court to overrule all objections to discovery where party failed to support its objections with evidence at first hearing on objections to discovery); *State ex rel Faith Hospital v. Enright*, 706 S.W.2d 852, 856 (Mo. banc 1986)(Prohibition is unavailable to party who makes only bare allegations that incident reports were prepared in anticipation of litigation. Trial court proper overruled objections at first hearing on objections).

V. Relator's First Point (Point A) on Appeal Should be Denied As Relator Is Not Entitled To An Order Prohibiting Respondent From Ordering Production Of

The Documents At Issue Because They Are Not Entitled To Work Product Protection In That The Documents Are Unrelated To The Litigation At Issue And Were Not Prepared For Preparation Of This Case

Brantley v. Sears, Roebuck & Co., 959 S.W.2d 927, 929 (Mo. App. 1998)

Halford v. Yandell, 558 S.W.2d 400, 407-409 (Mo. App. 1977)

State ex rel. J.E. Dunn Const. Co., Inc. v. Sprinkle, 650 S.W.2d 707, 711 (Mo. App. 1983)

Tobacco and Allied Stocks v. Transamerica Corp., 16 F.R.D. 534, 537 (D. Del. 1954)

As previously discussed, plaintiffs feel that Ford failed to meet its burden of proving the elements of the privileges claimed and further that the documents substantively are not privileged. Thus, the issue of whether work product is a perpetual privilege need not be reached. Respondent would also respectfully suggest that Relator's first point on appeal merely states an "abstract statement of the law". As such, it "fails to state what was before the trial court that supports the ruling appellant contends should have been made". *J.A.D. v. F.J.D. III*, 978 S.W.2d 336, 339 (Mo. banc. 1998). If reached, however, Judge Westbrooke's ruling is supported.

Work product, although often referred to as a privilege, is not a privilege, but rather a qualified immunity. As such, the circumstances of application should be narrowly construed. Privileges and immunities can and are utilized to hide the truth. In keeping with this knowledge, Missouri Courts have historically limited work product to material

prepared for prosecution of the case at issue. *Please see State ex rel. J.E. Dunn Const. Co., Inc. v. Sprinkle*, 650 S.W.2d 707, 711 (Mo. App. 1983)("The qualified 'work product' immunity applies only to information and material gathered by one's adversary in the litigation, or in preparation for the litigation, in which the discovery is being sought.").

In *State ex rel Day v. Patterson*, 773 S.W.2d 224, 228 (Mo. App. 1989) the Missouri Court of Appeals Eastern District took a different approach and expanded the immunity to include material prepared for prior related litigation. This Court, however, has not ruled on this issue. Thus, in this case, two issues arise: Will Missouri join the states that have expanded the work product immunity to include prior related litigation; and, if so, did Ford carry its burden of showing the documents at issue are related. This case shows the extreme danger in expanding the work product privilege to include prior litigation and furthermore, if inclined, the record before this Court shows Ford's complete failure to show that the documents at issue were prepared in related litigation.

Ford has set forth in its brief the reasons why various Courts have expanded the work product privilege to prior related cases. Ford has likewise recognized that there is a divergence of views on this issue and that several Courts have ruled as Missouri has historically ruled that the work product privilege is confined to the pending case. The policy grounds for this, in addition to narrow application of any privilege, are shown if one attempts to reason through what Ford is attempting to hide in this case.

Various Courts have judicially recognized that Ford, while making the Bronco II, knew that it would be unstable and knew that during ordinary avoidance maneuvers, it would

roll, and kill and cripple Ford's customers. *Please see Ford Motor Co. v. Ammerman*, Respondent's Appendix A55-59. The documented factual history concerning the design, manufacture and sale of the Bronco II warrants punitive damages. *Ammerman* at Respondent's Appendix A70-72.

After Ford began selling the Bronco II, it also began sending Ford engineers into the field to conduct in-depth investigations of Bronco II rollovers that were killing and crippling its customers. The documents at issue date back over twenty years and show an ongoing pattern and history of both Bronco II rollovers and Ford's investigation and knowledge of exactly why they were occurring. These documents involved Ford's engineers sent specifically to investigate why and under what circumstances the vehicle was rolling over and presumably to make recommendations as to how Ford should have designed the Bronco II so that this would not occur and suggestions for future models. Rather than admit its post sale knowledge Ford wishes to deny the product defects and knowledge thereof and attempt to leave the jury with the false impression that Ford had no inkling of real world problems. Such policy should not receive the legal blessing of this Court.

Other Court's which have considered this same issue have rejected the extension sought by Ford. Thus, Pennsylvania has consistently refused to extend the qualified protection of work product beyond the case the documents were created for. Please see *Reusswig. v. Erie Ins*., 2000 WL 33311533, 49 Pa. D & C. 4th 338, 349 (Ct. Com. Pl. 2000)(Work product "is applicable only to the litigation of the claim for which the

impressions, conclusions and opinions were made" and thus "such protection does not extend to subsequent litigation that follows upon the resolution of a prior claim"); *Yohe v. Nationwide Mutual Life Ins. Co.*, 1990 WL 303098, 7 Pa. D. & C. 4th 300, 305 (Pa. Com. Pl. 1990)(Work product protection only applies to the litigation of the claim for which it is made, and not subsequent later cases).

Other courts in interpreting the similar provisions of work product under the Federal Rules of Civil Procedure have likewise found the wiser course to not extend the qualified immunity beyond the life of the case which spawned it. Please see e.g. *U.S. v. I.B.M.*, 66 F.R.D. 154, 178 (S.D. N.Y. 1974)(Work product only applies within the case the documents were created for, and does not extend to cover prior closed cases); *Honeywell Inc. v. Piper Aircraft Corp*., 50 F.R.D. 117, 119 (M.D. Pa. 1970)(Documents from prior case "does not have the protection of the work product principal", citing 4 Moore, Federal Practice ¶26.23 [8.3] at p. 1436 (2d. ed.); *Hanover Shoe Inc. v. United Shoe Machinery Corp*., 207 F.Supp. 407, 410 (M.D. Pa. 1962)(Nothing in *Hickman v. Taylor* could possibly be seen to extend work product to documents prepared in a prior case); *In re Grand Jury Proceedings*, 73 F.R.D. 647, 653 (M.D. Fla. 1977)(Work product does not protect material from prior and closed case as the policy for recognizing work product has long since been achieved, and to allow continuation of the protection would serve only to thwart and frustrate the search for the truth).

The Court in *Tobacco and Allied Stocks v. Transamerica Corp*., 16 F.R.D. 534, 537 (D. Del. 1954) likewise rejected the extension of work product to documents created

long before the instant litigation could reasonably have been said to be contemplated. In *Tobacco and Allies Stocks*, the Court held documents created 8 years or more before the filing of the instant case cannot be work product as they were not prepared for "*the instant case for presentation to this court*." *Id*., emphasis in original. The Court held that the documents were not sought to "obtain benefit of the present [counsel's] industry in the preparation *of the case at bar* for trial". *Id*., emphasis in original. Instead, the discovery was sought to ascertain what knowledge the opponent "had in fact and are chargeable with in the instant case." *Id*.

Just as in *Tobacco and Allied Stocks* the information sought does not somehow allow plaintiffs to benefit from the work of defendant's counsel, as <u>if</u> the documents were prepared for cases, they are long since closed. Rather, plaintiffs seek to ascertain from these long closed investigations what knowledge Ford is chargeable with, i.e what has Ford been hearing from its engineers about these vehicles since the first one rolled over as predicted by these very same engineers.

Missouri law has consistently limited this qualified immunity to pretrial discovery. In *Halford v. Yandell*, 558 S.W.2d 400, 407-409 (Mo. App. 1977) the Court held that the purpose of work product was completed once a case reaches trial, and as such, is extinguished. The Court found that "the reasons for largely confining the work product rule to its role as a limitation on pretrial discovery are compelling". *Id*. at 408. The primary reason to extinguish work product once a case is tried is that:

> the injury to the fact finding process is far greater where a rule keeps

> evidence from the factfinder than when it simply keeps advance disclosure of evidence from a party or keeps from him leads to evidence developed by his adversary and which he is just as well able to find for himself.

Id.

The Court went on to note that "the danger perceived in *Hickman* that each party to a case will decline to prepare in the hopes of eventually using his adversary's preparation" is absent once pretrial preparation for the case the material is gathered in has concluded. Accord *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 868 fn5 (Mo. banc 1993)(Citing *Halford* for the proposition that work product does not extend beyond pretrial discovery, as work product material becomes admissible upon trial if relevant).

Ford has tried numerous Bronco II cases. Please see e.g. *Ford Motor Co. v. Ammerman* Respondent's Appendix Tab B(1) A49-72. Under Missouri law, therefore, the qualified immunity these documents may have had at some point has now been extinguished. The only effect of allowing the protection to continue on 20 years after some of these investigations would be causing "injury to the fact finding process" by allowing the continue concealment of what knowledge Ford "had in fact and are chargeable with in the instant case". *Halford* at 408; *Tobacco and Allies Stocks* at 537.

Finally, Respondent properly ordered the production of this material even if the Court were to consider extension of work product to prior related litigation, <u>for the simple reason that Ford has produced no evidence showing these cases were in fact related.</u> Under Ford's argument, work product does not extend to prior litigation unless the proponent

proves that the prior litigation is in fact "related". Please see *Brantley v. Sears, Roebuck & Co.*, 959 S.W.2d 927, 929 (Mo. App. 1998). In *Brantley*, the Eastern District required the production of a statement from prior litigation, because the party claiming protection could not show sufficient relation between the prior case the statement was taken in, and the current case at bar. *Id*.

Just as Ford admits it produced no evidence to support the normal elements of work product, it also failed to offer any evidence that these closed cases were related to the case at bar. One of the initial challenges issued by plaintiffs to Ford's blanket claims of protection was that its answers to discovery showed these prior engineering investigations had no relation to this case. Please see Tab C Relator's Appendix, A24-25. Despite this, Ford has never offered any evidence or affidavits showing that these reports, some more than 20 years old, were prepared for litigation related to this case. Ford's argument that the Court was merely ruling the legal issue of whether work product extends beyond the initial case ignores the necessary factual foundation Ford was required to prove for even this ruling. The Court could not make a legal ruling in a vacuum, as such would be nothing more than an advisory opinion. Thus, even under Ford's overly restrictive analysis of the purpose of the hearing, Ford still failed to satisfy its burden to prove these engineering investigations were "related" to this case.

VI. Relator Is Not Entitled To An Order Prohibiting Respondent From Overruling Ford's Objections Because The Trial Court Properly Exercised Its Discretion To Control Its Docket By Refusing To Allow Tardy Privilege

Claims In That Ford Violated The Court's Prior Scheduling Order, Filing A Deficient Privilege Log Over A Month Too Late Under The Court's Order

8 Wright & Miller, Fed. Prac. & Proc. Civ.2d §2016.1 (2004)

Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 541-542 (10th Cir. 1985)

Restorative Services, Inc. v. Professional Care Center, Inc., 793 S.W.2d141, 144 (Mo. App. 1990)

Ford's petition barely mentions the issue of why it refused to comply with Judge Westbrooke's prior Order despite having received two extensions. At the hearing, the Court was faced with facts showing that Ford had violated its prior ruling despite having had (a) two extensions of time; (b) two months since the Court's Order requiring the logs be produced, and (c) 16 months since Ford first claimed the documents were privileged. The Court also had to consider the fact that Ford's late-filed logs were neither accurate nor complete. Instead, on February 23, after two prior extensions and over a month after the deadline for filing its logs, Ford for the first time claimed privilege over 31 new sets of tests, and over 460 new field performance assessment documents.

Based upon the record showing Ford's refusal to cooperate in discovery and its refusal to honor Court Orders, sanctions against Ford were proper. The Trial Court had "an obligation to see that discovery rules are followed to expedite litigation." *Restorative Services, Inc. v. Professional Care Center, Inc.*, 793 S.W.2d141, 144 (Mo. App. 1990). The Trial Court is therefore given broad discretion in enforcing discovery, which includes deferential review by the Appellate Court. *Luster v. Gastineau*, 916 S.W.2d 842, 844

(Mo. App. 1996). Thus, Judge Westbrooke's ruling is supported by case authority giving broad discretionary powers to sanction Ford for its willful and unexplained failure to comply with the Court's Order and timely file a privilege log.

The Trial Court is authorized to set a schedule for claims of privilege, as it is has an obligation to expedite litigation. *Restorative Services, Inc. v. Professional Care Center, Inc*., 793 S.W.2d 141, 144 (Mo. App. 1990). The Trial Court is thus given broad discretion in the management of its docket. *Lakeland Condominium 2 Owners Association, Inc. v. Durian*, 906 S.W.2d 396, 399 (Mo. App. 1995). This broad discretion necessarily includes "the control and management of discovery". *State ex rel Dixon v. Darnold* at 68. Ford's claim that the Trial Court was without power to overrule untimely or improperly made privilege claims as a sanction for violating its prior Order is incorrect. Please see e.g. 8 Wright & Miller, Fed. Prac. & Proc. Civ.2d §2016.1 (2004)(Failure to properly assert privilege in a timely manner results in losing the protection claimed); Advisory Committee Notes to the 1993 amendments to Rule 26(b)(5) of the Federal Rules of Civil Procedure (Noting party who fails to timely disclose necessary information for privilege claims are subject to sanctions and loss of the privilege); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 541-542 (10th Cir. 1985)(Rejecting request for extraordinary writ, holding failure to meet burden of proof at required time in Trial Court will not be excused, even if it could later be shown that documents were privileged "if a timely showing had been made").

The Trial Court was faced with Ford's blanket claims of privilege for over a year. At

the first hearing on this matter, Ford provided nothing in support of its claims of privilege. Rather than Order all of the documents produced as would have been proper under *State ex rel. Dixon v. Darnold*, the Court set a deadline for the filing of a full and complete privilege log. Ford ignored this Order, filing its logs more than a month late, without the Ordered specificity, and without seeking an extension from the Trial Court. When faced with Ford's blatant disregard for its previous Order, the Trial Court was well within its discretion to overrule Ford's unsupported privilege claims as untimely.

VII. Conclusion

A writ of prohibition should be issued only in those rare circumstances where the actions of the Trial Court are "so arbitrary and unreasonable as to shock the sense of justice" of the reviewing Court. *State ex rel. Dixon* at 68. What action in this case did the Trial Court take to satisfy this exceptional standard? As listed above, at the hearing which Ford complains of, the Trial Court was faced with the following facts:

1. Ford had made improper blanket claims of privilege for over 16 months;
2. Ford had violated the Court's prior Order requiring full and complete logs be submitted, by filing incomplete logs, out of time, and without having sought extension from the Court to do so;
3. Ford at the second hearing on these matters, and after 3 rounds of briefing utterly failed to offer any affidavits, testimony or other evidence in support of any privilege or protection claimed, offering only the argument of its lawyers. Ford admits it utterly failed to introduce supporting evidence for

either (a) the general required elements of attorney client privilege or work product protection, or (b) any proof that the engineering reports of other Bronco II accidents (some 20 years old) were somehow "related" to the case at hand to qualify for the extension of the work product protection Ford sought; and

4. Ford failed to respond to plaintiffs case authority showing the reports sought were entitled to no protection.

Faced with these facts, and given clear Missouri law as to who bears the burden to prove all of the elements of privilege, there is nothing shocking about the Trial Court's actions. Indeed, given the case law and history of the dispute, it would have been an abuse of discretion to not take the action that the Trial Court did. Please see *State ex rel. Dixon v. Darnold*, supra.

Ford has also failed to satisfy the high burden to show a writ of prohibition is proper through its numerous procedural failures. Ford has failed to provide a record of the hearing of which it objects. Ford has also failed to provide this Court with either the objections it seeks to have upheld, or the notice it claims was deficient. In regard to Ford's second point on appeal, it has raised this argument for the first time in this Court, and has failed to either cite the provision of due process it claims violated, or provide the text of the due process clause in its Appendix as required.

Factually and procedurally, this case is not the proper forum for entry of an Order in Probation, and thus Respondent would respectfully suggest the Court should enter its Order

quashing the preliminary Order in Prohibition.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06, SPECIAL RULE NO. 1 AND

CERTIFICATE OF SERVICE

STATE OF MISSOURI)

) ss:

COUNTY OF GREENE)

Pursuant to Rule 84.06(c) and Special Rule No. 1, counsel for Respondent certifies that this brief complies with the limitations contained therein. There are 18, 297 words in this brief. Counsel for Respondent relied on the word count of his word processing system in making this certification.

Pursuant to said Rules, counsel for Respondent certifies that the disk filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Respondent states that Respondent's brief complies with Rule 55.03 and was by him caused to be served by Federal Express, in the following stated number of copies, addressed to the following named persons listed in the Certificate of Service below, at the addresses shown, all on the 23rd day of August 2004:

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This is to certify that on the 23rd day of August, 2004, a copy of the above document was forwarded via ( ) U.S. Mail, ( ) Hand Delivery, ( ) Federal Express addressed to the following:

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